2003895 (Migration) [2022] AATA 5022 (18 November 2022)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	2003895
MEMBER:	Andrew McLean Williams
DATE:	18 November 2022
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas: • Public Interest Criterion 4020 for the purposes of cl 186.213 of Schedule 2 to the Regulations

Statement made on 18 November 2022 at 1:58pm

CATCHWORDS
MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – false or misleading information given in previous visa application – medical treatment or costs not expected during visit – secondary applicant's check-ups and medication provided in home country – reasonable interpretation of question and genuine attempt to answer truthfully – element of fraud or deception necessary – decision under review remitted

LEGISLATION
Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 186.213; Schedule 4, PIC 4020

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a Delegate of the Minister for Home Affairs on 18 February 2020, refusing to grant the Applicants *Employer Nomination (Permanent)* visas, under s.65 of the *Migration Act 1958* (Cth) ('the Act').

3. The Applicants applied for the visas on 30 September 2019. The Delegate refused to grant the visas on the basis that the first-named Applicant ('the Applicant') did not satisfy the requirements of clause 186.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations') because the Delegate was not satisfied that the Applicant satisfied the requirements of clause 186.213(1) in Schedule 2 of the Regulations, which amongst other things requires that the Applicant satisfy the requirements of Public Interest Criteria ('PIC') 4020.

4. PIC 4020 specifies that there be no evidence before the Minister of an Applicant having given, or having caused to have been given, to the Minister, an Officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority, or to a Medical Officer of the Commonwealth either a 'bogus document'; or information that is false or misleading in a material particular in relation to either (a), the application for the visa; or (b), a visa that the Applicant held in the 12 month period immediately before the visa application was made.

5. Both of the Applicants appeared before the Tribunal on 17 November 2022, by means of video link.

6. For the following reasons the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by clause 186.213 for the grant of the visa. Broadly speaking, this requires that:

    - there be no evidence that the Applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or a Medical Officer of the Commonwealth, a 'bogus document' or information that is false or misleading in a material particular in relation to the application for the visa, or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the Applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the Applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the Applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted

or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the Applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5), and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies irrespective whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies irrespective whether or not the document or information was provided by the applicant knowingly, or unwittingly.

11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the Applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary in order to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

12. In this case, the two Applicants are each United States citizens, and are married. A Subclass 186 (Employer Nomination Scheme) visa was lodged by [the first applicant] on 30 September 2019 as the primary applicant, therein also nominating his spouse [the second applicant] as a secondary visa applicant. PIC 4020 is an eligibility requirement that must be satisfied by all family members.

13. Prior to applying for the Subclass 186 visa, [the first applicant] and his partner [the second applicant] had been living and working in Australia on a Subclass 457 visa, which had been applied for on 7 December 2015.

14. After lodgement of the Subclass 186 visa application, the Department commenced the process of eligibility assessment and identified information that caused the Delegate to form a view that information that had been previously provided - at the time of their making application for the Subclass 457 visa - may have been false and misleading, in a material particular.

15. In this regard, on the application form for the Subclass 457 visa, the Applicant had declared 'no' to the following question:

> *16. "During your proposed visit to Australia, do you, or any other person included in this application, expect to incur medical costs, or require treatment or medical follow up for: …./ HIV infection, including AIDS"*

17. At the time of the making of that declaration, the Applicant's spouse [the second applicant] had in fact been diagnosed with HIV.

18. These matters were put to the Applicants on 10 January 2020, by means of a natural justice letter, thereby inviting their further comment. The Applicant's responded to that invitation on 7 February 2020, and indicated as follows:

- [The second applicant] had been diagnosed with HIV in June 2011, yet had since always remained asymptomatic, and in good health.

- The 'no' response was provided on the basis that both applicants had interpreted the question as asking whether an applicant expected to incur medical costs, or to require treatment or medical follow-up for a condition *whilst in Australia*. Yet, all of [the second applicant]'s treatment – arising only in the form of anti-retroviral medication - is provided from the United States, and any medical checks usually conducted bi-annually only, are also provided during return visits back to the United States.

- For more than two years after the granting of the Subclass 457 visa [the second applicant] did not receive any treatment, or incur any medical costs, or require any medical follow-up for his condition whilst in Australia.

- There was never any intention to mislead the Department of Home Affairs. Rather, the answer given on the Subclass 186 visa application form was one that was provided in good faith, on the basis of an interpretation of the question posed on the form that was not unreasonable interpretation, in all the circumstances.

19. In *Tripedi v Minister for Immigration and Border Protection* (2014) FCAFC 42, per Allsop CJ, Buchanan J and Rangia J (4 April 2014), Buchanan J said (at [32] – [33]):

> 20. "It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a "public interest" criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application**. I would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters.** However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.
>
> 21. In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody's part, and in my view does so in the present context"
>
> 22. [matters of **emphasis** not in the original, yet now included here, by the Tribunal].

23. This Tribunal is bound to follow pronouncements of the Full Federal Court. It follows therefore that PIC 4020 is *not* engaged in circumstance of innocent or accidental misstatement, such as those which arose in this instance as part of a genuine yet mistaken attempt by the Applicants to answer the posed question truthfully. Therefore, the Tribunal determines that the Applicant **does satisfy** the requirements of PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

24. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

25. The Applicant has not been refused a visa in the 3 years prior to the making of this application by reason of any failure to satisfy PIC 4020(1).

26. Therefore, PIC 4020(2) is also met.

Has the applicant satisfied the identity requirements?

27. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal has examined and considered the biometric data from each of the Applicant's United States passports and is satisfied as to their identity.

28. Therefore, the Applicant also meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

29. PIC 4020(2B) requires that neither the Applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is either granted, or refused ('the relevant period'). This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

30. There is no information before the Tribunal suggesting that either Applicant has been refused a visa by reason of a failure to satisfy the identity requirements in PIC 4020(2A) during the relevant period.

31. Therefore PIC 4020(2B) is now also met.

32. On the basis of the above, the Applicant **does satisfy** PIC 4020 for the purposes of cl 186.213.

DECISION

33. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first-named Applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:

    - Public Interest Criterion 4020 for the purposes of cl 186.213 of Schedule 2 to the Regulations

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…